Filed 6/6/07 In re J.M. CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J. M., a Person Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. MISTY M., Defendant and Appellant.	F051486 (Super. Ct. No. JD101853) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and Appellant.

Darlene A. Kelly, under appointment by the Court of Appeal, for Jordan M., minor.

B.C. Barmann, Sr., County Counsel, and Jennifer L. Thurston, Deputy County Counsel, for Plaintiff and Respondent.

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[*]Before Vartabedian, Acting P.J., Levy, J., and Cornell, J.

Misty M. appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26) to her four-year-old son, J.M.[1] She challenges the superior court's decision on two grounds. One, she argues the juvenile court failed to ascertain whether there was a legal impediment to adoption by the child's relative caregivers. She speculates one of the caregivers may be disqualified from adoption. Two, she contends continuing her relationship with her son would be in his best interest. On review, we disagree and will affirm.

PROCEDURAL AND FACTUAL HISTORY

In September 2003, respondent Kern County Department of Human Services (the department) detained nine-month-old J.M. after he suffered a skull fracture for which appellant had no reasonable explanation. She also delayed in seeking treatment for him. The Kern County Superior Court, sitting as a juvenile court, thereafter exercised its dependency jurisdiction over J.M. (§ 300, subd. (a) & (b)), adjudged him a dependent child and removed him from parental custody subject to family reunification services. After 12 months of such services, appellant made moderate progress. As a result, the court in December 2004 placed J.M. with her, provided she maintain stable housing as well as regular contact with the family's social worker. Appellant, however, did neither. Consequently in March 2005, the court ordered the department to re-detain J.M.

Following proceedings on a supplemental petition (§ 387) brought by the department, the court once again removed J.M. from appellant's custody and ordered no further services for her. It also set a section 366.26 hearing to select and implement a permanent plan for J.M.

At an August 2005 section 366.26 hearing, the court selected a planned permanent living arrangement, also referred to in the record as long-term foster care, for J.M. with

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

his paternal grandparents. The paternal grandparents had been J.M.'s caregivers since March 2004, except for the short time in early 2005 that he spent in appellant's care. The court expressly found a statutory exception to adoption as the permanent plan. (§ 366.26, subd. (c)(1)(D).) The court determined J.M. resided with relatives who were unable or unwilling to adopt him, due to exceptional circumstances which did not include an unwillingness to accept legal or financial responsibility for him, but who were willing and capable of providing him with a stable and permanent environment and his removal from those relatives would be seriously detrimental to his emotional well-being.

Although the court did not state its reasoning (§ 366.26, subd. (c)(1)), the department's adoption assessment at the time provided the following information. The paternal grandparents had expressed a desire to adopt J.M. However, the department's adoption worker did not consider the child "an ideal candidate for adoption." He was experiencing severe speech and language delay as well as behavioral problems which the adoption worker wanted evaluated.[2] Once J.M's special needs were evaluated, the adoption worker believed it would take additional time for the department to evaluate if the grandparents could meet those needs in the future. Meanwhile, the grandparents' one-bedroom apartment was too small for a favorable adoption home study. They hoped to move to a larger home but currently had limited income to finance such a move. Further, the adoption worker observed legal guardianship, rather than a planned permanent living arrangement, would have been a better alternative over long-term foster care for J.M. However, because he had not been in his grandparents' home for one continuous year, they could not qualify for "Kin-Gap" funding.

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[2] According to a Court Appointed Special Advocates (CASA) volunteer's report filed in August 2005, the adoption worker was concerned that J.M.'s problems were genetic, given that both his father and paternal grandmother received "SSI for mild retardation." As it turned out, J.M. was not mentally retarded.

Notably, the adoption assessment also described J.M.'s "minimal visiting relationship with" appellant.

> "When the mother attends visits the child ignores the mother and is observed to be bonded to this maternal grandmother who attends most visits. The child has been observed to become agitated and physically aggressive towards his mother when she attempts to interact with [J.M.]. The child's relationship is not significant enough that he will suffer severe emotional trauma if the parental rights of the mother, Misty [M.], were terminated."

The CASA volunteer similarly reported appellant had a track record of not attending scheduled visits. Also, the CASA volunteer had not observed a loving and affectionate relationship between appellant and J.M. during visits the volunteer attended. J.M. did not display a close bond with his mother.

In selecting a planned permanent living arrangement as the permanent plan for J.M., the court stated a specific goal of achieving a less restrictive environment (i.e., a more permanent plan) by its next review. The court set a further review hearing for February 2006.

By the time of the next review, the department recommended that the court set a new section 366.26 hearing for three-year-old J.M. The department's previous concerns about a more permanent plan for the child had been addressed. First, Kern Regional Center (KRC) had assessed the child and determined J.M. had speech and language delay. The grandparents in turn enrolled him in KRC services to address those delays. In addition to making progress on his speech and language delay, J.M. had less frequent tantrums. He was currently thriving in his grandparents' care. The grandparents worked exceedingly well with J.M. and met his needs. The grandparents who remained interested in adopting J.M. also rented a larger home in which J.M. had his own bedroom. Further, the grandparents would soon qualify for Kin-Gap funds.

The CASA volunteer concurred with the department's recommendation for a more permanent plan for J.M. She reported on the strides she observed J.M. to have made. He

had begun to repeat the cadence in words and was able to say “peas” and “tanku” as well as mimicking syllables in words. He could point to objects when asked where something was. His social interaction also improved. He played happily and appropriately with his toys. He enjoyed touching, hugging and cuddling. He would approach his grandparents for comfort and security and loved to give and receive hugs and kisses from them. The CASA volunteer also observed that the grandparents were able to handle discipline appropriately with positive reinforcement and patience.

Both the department and the CASA volunteer separately reported on visitation between J.M. and appellant. According to the department, those visits had improved. Appellant showed affection and patience with J.M. Meanwhile, he did not hit, scream or pull away from appellant, as he previously did. The CASA volunteer described a recent visit she had observed. Appellant arrived one hour late and, although she picked up and hugged J.M., she spoke with her mother, who was also present, for the majority of the visit. For his part, the child did not seek out appellant. His maternal grandmother had to prompt him to go to appellant and give her a kiss. J.M. did not seek out appellant for comfort or security.

In a supplemental report, the department described its recent contacts with appellant. There was an investigation of a domestic violence referral from January 2006 involving appellant and the father of another child to whom she had recently given birth. According to the department, the father was “no match for Misty’s temper and violent behavior.” She was also belligerent and uncooperative with department social workers who inquired about the baby. She stated she was “tired of people trying to tell her how to raise her ‘fucking’ kids.” She also displayed her temper toward J.M.’s grandparents and father. The department characterized appellant as “unstable” and her behavior as “volatile and unpredictable.” According to the department, her temper created a threat to those around her.

In March 2006, the superior court followed the recommendation of the department as well as the CASA volunteer and set a new section 366.26 hearing for J.M. In its new section 366.26 report prepared in October 2006, the department recommended the court appoint the grandparents to be J.M.'s legal guardians. The department based its recommendation on its adoption worker's opinion that there was presently a strong bond between J.M. and his parents. Under the heading of "ANALYSIS," the department explained:

> "[J.M.] has had regular contact with both of his birth parents throughout his dependency. Case documentation indicates that he has a close relationship with his father. The grandparents supervise those visits. [J.M.] has seen his mother on a very regular basis over the last year. His relationship with his mother has really improved, especially since his communication skills have improved. He enjoys the visits with his mother and gets excited when the social worker arrives to take him to the visits. The visits are of good quality. It is obvious that they share a bond and it is not in the child's best interest to terminate the parental rights of either his mother or father. Adoption is not in the best interest of the child at this time, due to his bond with his parents. In addition, [J.M.]'s age, ethnicity, severe speech and language delays and behavioral problems are factors [that] make it difficult to find an adoptive family, should the current caretakers become unable to adopt in the future. However, [the] caretakers are committed to adoption, but it is the assigned Adoption Worker's, Marsha Allen, opinion that is not in the child's best interest because of the strong bond he has with his parents."

The CASA volunteer also submitted a report, but recommended that the court free J.M. for adoption. In her report, she offered some insights into the adoption worker's assessment. In early September 2006, the volunteer had a conversation with the adoption worker in which Allen said she was leaning toward recommending adoption. A week later, the adoption worker observed a single visit between appellant and J.M. at which point the adoption worker stated her belief that there was a bond between J.M. and appellant because J.M. cried when leaving the visit.

The CASA volunteer, who had been assigned to J.M.'s case since January 2005, added:

> "The CASA has had [the] opportunity to observe several visits between [J.M.] and his mother, [Ms. M.] The CASA has never seen [J.M.] cry when leaving his mother, but walks out the door without crying. The CASA observed the social worker tell [J.M.] to say good-bye to his mother. [¶] During visits to [J.M.'s] home the CASA observed [J.M.] cry when the CASA stopped playing with him and prepared to leave because he enjoys the toys and attention and did not want to stop playing. The CASA observed that [J.M.'s] crying doesn't usually last long and his grandmother will intervene and get him to stop crying. [¶] The CASA observed that [J.M.] has spent the majority of his life in the home of his paternal grandparents . . . and exhibits security, developmental progress and stability in the [grandparents'] home. The CASA believes that adoption by his paternal grandparents provides the optimum security and [J.M.'s] best prospect of a secure future." (CT 556-557)

The court would eventually conduct its second section 366.26 hearing for J.M. in October 2006. County counsel on behalf of the department submitted the matter on the department's recommendation. Appellant's trial counsel submitted as well. Then, the father's counsel, followed by J.M.'s counsel and the CASA volunteer each advocated in favor of adoption and termination of the parents' rights. County counsel responded that, as an officer of the court, it was her opinion that if the court followed the department's recommendation and selected legal guardianship as a permanent plan, such a decision would be overturned on appeal. Appellant's trial counsel at this point did not move to reopen the matter and call any witnesses. Instead, he argued against adoption based on the adoption worker's opinion. Relevant to this appeal, appellant's trial counsel also argued that J.M. was unadoptable, citing two misdemeanor convictions the department reported the paternal grandfather had, the first from 1987 and the second from 1997.

Trial counsel failed to note that the department also reported that exemptions for the grandfather's convictions had been approved in 2005.[3]

After the matter was submitted, the court found clear and convincing evidence that J.M. would likely be adopted specifically by his grandparents and that appellant failed to prove it would be detrimental to J.M. to terminate the parental relationship.

DISCUSSION

Issue of Exemption

Appellant claimed in her opening brief the court should have ascertained whether an exemption had been granted for the paternal grandfather's two misdemeanor convictions and therefore whether there was a legal impediment to the grandparents adopting J.M. In so arguing, appellant, like her trial counsel before her, overlooked the record evidence that an exemption had been approved at the time J.M. was placed a second time in his grandparents' care. Made aware of her oversight, appellant argues in her reply that she remains entitled to reversal. She speculates that the exemption issued at the time of placement does not necessarily qualify for adoption screening and the grandfather still may be disqualified from adopting J.M. Although she admits she has not challenged J.M.'s adoptability, she nonetheless urges that "where a specifically adoptable child has been placed in a home where the prospective adoptive parent embodies disqualifying characteristics, termination of parental rights is not proper." We conclude appellant's arguments are meritless.

First and foremost, an exemption has been issued for the grandfather's prior misdemeanor convictions. Appellant fails to point to any authority which undermines that exemption for adoption purposes. There is also no evidence in the record of any

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[3] A county may grant a criminal records exemption, based on substantial and convincing evidence to support a reasonable belief that the person with the criminal conviction is of such good character as to justify a placement and not present a risk of harm to a dependent child. (§ 361.4, subd. (d)(2).)

legal impediment to the grandparents' adoption of J.M. Instead, appellant's reply argument is based on nothing more than her speculation. Thus, appellant has failed to meet her appellate burden of affirmatively showing error on the record. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The record in fact contains a favorable preliminary assessment, as required for a section 366.26 hearing (see § 366.21, subd. (i)(4) & § 366.22, subd. (b)(4)), of the grandparents' eligibility and commitment to adopt J.M.

In addition, appellant's reply is a thinly-veiled new argument which we need not consider. In her opening brief, she argued the trial court failed to ascertain if an exemption for the grandfather's prior convictions had issued. Her reply brief asserts that an exemption issued for placement purposes may not suffice for adoption purposes. Points raised for the first time in a reply brief will not be considered unless there is a good cause showing for failure to present them earlier. (*Monk* v. *Ehret* (1923) 192 Cal. 186, 190.) Appellant fails to make any such showing.

No Detriment

Appellant also contends the court erred when it declined to find termination would be detrimental to J.M.'s best interests due to his parent/child relationship (§ 366.26, subd. (c)(1)(A)). She claims she was entitled to such a finding based on the evidence contained in the department's report and its adoption worker's opinion that there was a strong bond between J.M. and her so that adoption was not in his best interest.

Although section 366.26, subdivision (c)(1) acknowledges that termination may be detrimental under specifically designated circumstances, a finding of no detriment is not a prerequisite to the termination of parental rights. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) It is the parent's burden to show that termination would be detrimental under one of the exceptions. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) Thus, when a juvenile court rejects a detriment claim and terminates parental rights, the appellate issue is not one of substantial evidence but whether the juvenile court

abused its discretion. (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1351.) On review of the record, we find no abuse of discretion.

There is nothing in the statutory or case law which bound the juvenile court to the adoption worker's opinion that there was a strong bond between J.M. and appellant during visitation so that adoption was not in his best interest. As the trier of fact, the court was entitled to determine what weight to give that opinion. Given the CASA volunteer's insights into how the adoption worker arrived at her conclusion, the court properly could have determined there was an insufficient basis for the adoption worker's opinion. Also, given the conflicting evidence throughout the record regarding any parent/child bond between appellant and J.M., the court may have resolved there was no such bond or that it was not strong enough to outweigh the preference for adoptive placement. Indeed, a juvenile court may reject such a claim simply by finding that a relationship maintained, or in this case developed, during visitation does not benefit the child significantly enough to outweigh the strong preference for adoption. (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1350.)

> "The exception in section 366.26, subdivision (c)(1)(A), requires that the parent-child relationship promote the well-being of the child to such a degree that it outweighs the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) A juvenile court must therefore: 'balance[] the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' (*Id.* at p. 575.)" (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1342.)

Here, there was no evidence that J.M. would be greatly harmed. Thus, we conclude the court did not abuse its discretion in finding that appellant failed to prove it would be detrimental to J.M. to terminate parental rights.

DISPOSITION

The order terminating parental rights is affirmed.